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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JOE MERTON et al., Plaintiffs and Appellants, v. WASTE MANAGEMENT, INC., et al., Defendants and Respondents.	B166688 (Los Angeles County Super. Ct. No. BC272347)

APPEAL from a judgment of the Superior Court of Los Angeles County. Peter Lichtman, Judge. Affirmed.

Persona, Langer, Beck, Lallande & Serbin, Ellen R. Serbin and Michel F. Mills for Plaintiffs and Appellants.

Quinn Emanuel Urquhart Oliver & Hedges, Steven G. Madison, John S. Purcell and William G. Berry for Defendants and Respondents.

* * * * * *

Appellants Joe Merton, Celso Roque and Lydia Sapiandante, on behalf of themselves and as class representatives, appeal from a judgment entered after the trial court sustained the demurrer of respondents Waste Management, Inc.,[1] Western Waste Industries (Western Waste),[2] and USA Waste of California, Inc. (USA Waste), to appellants' second amended complaint. We affirm.

CONTENTIONS

Appellants contend that the trial court erred in sustaining the demurrer: (1) based on the litigation privilege; (2) to the cause of action for unfair competition on the ground that appellants, as third-party beneficiaries, are barred from asserting rights greater than those of the promisee; (3) to the causes of action for fraud; (4) to the cause of action for deceptive practices under Civil Code section 1750 et seq.; (5) to the cause of action for unfair competition; and (6) to the cause of action for conversion.

FACTS AND PROCEDURAL BACKGROUND

Appellants filed a complaint on April 19, 2002, and a first amended complaint on July 24, 2002.

Appellants filed a second amended complaint (SAC) against respondents for the first cause of action for fraud (by Merton and Roque against respondents); the second cause of action for deceptive practices in violation of Civil Code section 1750 (by Merton and Roque against respondents); the third cause of action for breach of contract (by Merton and Roque against respondents); the fourth cause of action for fraud (by Sapiandante against respondents); the fifth cause of action for breach of contract (by Sapiandante against respondents); the sixth cause of action for unfair competition (by

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1 Waste Management, Inc., was formerly known as USA Waste Services, Inc., and was originally sued under that name.

2 Western Waste Industries was formerly known as Western Refuse Hauling, Inc., and was originally sued under that name.

appellants against respondents); the seventh cause of action for conversion (by appellants against respondents); and the eighth cause of action for unjust enrichment (by appellants against respondents).

The SAC, which was brought as a consumer class and private attorney general action, alleged the following. Respondents overcharged residential and commercial/industrial residents of the City of Carson (the City) through fraudulently obtained rate hikes. From 1991 to December 2001, the City granted respondents franchises to collect refuse in the City. Between June 1991 and July 1998, respondents lied to the City to justify at least four residential and three commercial rate increases.

A fiduciary relationship existed between the City and Carson residents, of which respondents were aware. According to the second amended agreement for residential refuse collection services, entered into between the City and respondents on July 1,1989 (second amended agreement), at part 6.1, the City or respondents could initiate a general rate adjustment only for specified reasons, including a change in the cost of motor vehicle fuel, disposal costs, or the consumer price index.[3]

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[3] Part 6.1 of the second amended agreement sets forth the specified reasons as follows: "6.1.2.1 An increase or decrease in the cost of motor vehicle fuel of a five percent annual average which could not have been anticipated by Contractor at the time of submission of Contractor's proposal to City to perform the services which are the subject of this Agreement. [¶] 6.1.2.2 Increased or decreased costs associated with disposal of residential refuse at landfills which could not have been anticipated by Contractor at the time of submission of Contractor's proposal to City to perform the services which are the subject of this Agreement. [¶] 6.1.2.3 An increase or decrease in the Consumer Price Index for Urban Wage Earners and Clerical Workers, Los Angeles-Anaheim-Riverside Area (1982-84 = 100), All Items as published by the U. S. Bureau of Labor statistics, not to exceed a five percent (5%) per annum increase. To calculate such adjusted rate, the monthly rate for 1989-90 ($11.90) shall be multiplied by a fraction, the numerator of which is the Index for June immediately preceding the year for which the rate is being calculated, and the denominator of which is the Index for the month of June, 1989 (125.3). The product shall be the monthly rate for the next fiscal year beginning July 1st, subject to the 5% per annum limit as provided in the first sentence of this section 6.1.2.3. For example, if the Index for June, 1990 should be 133.5, the rate calculated under this section would be: [133.5 divided by 125.3, multiplied by] $11.90 = $12.68;

At part 6.1.4, the second amended agreement required that respondents had the burden of justifying any rate increase.

On July 16, 1991, the City and respondents executed an amendment to the second amended agreement for refuse collection that extended the term of the second amended agreement until the expiration of the concurrently executed agreement for commercial and industrial refuse collection services (commercial agreement). The City established commercial/industrial rates based on a $25.82 per ton charge. The commercial agreement permitted rate adjustments only when respondents proved their expenses for motor vehicle fuel and/or landfill disposal increased more than the stated percentage.

The SAC alleged that respondents petitioned the City to increase the rates each year from 1992 through 1998, intentionally making false representations that the consumer price index factors and landfill disposal fees increased sufficiently to justify rate increases. Respondents paid landfill rates and other costs below what they represented to the City.

In June 2000, the City suspected that respondents fraudulently obtained rate hikes, and learned through an audit that respondents had overstated their landfill and other costs in order to justify the rate increases. The City changed contractors in December 2001. The City settled its claims against respondents in an undisclosed settlement, but did not disclose its findings to City residents. Appellants were ignorant about the overcharges until shortly before the filing of this action.

Western Waste and USA Waste demurred and joined in each other's demurrers and moved to strike portions of the SAC. Waste Management, Inc., moved to quash service of the summons on jurisdictional grounds.

The trial court sustained Western Waste's demurrer without leave to amend on the ground that the litigation privilege barred the claims for fraud, deceptive practices, unfair competition, and conversion. The trial court also determined that the claims for fraud,

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$11.90 + (.5 multiplied by 11.90.) = $12.495 (the maximum). The 1990-91 rate would be $12.495."

deceptive practices, breach of contract, unfair competition, conversion, and unjust enrichment were improper collateral attacks on an administrative final decision. Moreover, the trial court found that as to the breach of contract, unfair competition and unjust enrichment causes of action, the plaintiffs, as third-party beneficiaries, were not entitled to greater rights under the contract than the City.

The trial court determined that USA Waste's demurrer and motion to strike and Waste Management's motion to quash were moot.

This appeal followed.[4]

DISCUSSION

I. Standard of Review

The appellate court assumes the truth of all properly pleaded material allegations of the complaint, and gives "the complaint a reasonable interpretation by reading it as a whole and its parts in their context [citation]." (*Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 210 (*Silberg*).) When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action; when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) If the complaint can be cured, the trial court has abused its discretion. (*Ibid*.)

II. Whether the trial court erred in sustaining the demurrer to the SAC based on the litigation privilege

A. The litigation privilege

Appellants first contend that the litigation privilege does not apply to bar the SAC. We disagree.

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[4] Appellants do not appeal from the trial court's ruling on their third and fifth causes of action for breach of contract and eighth cause of action for unjust enrichment.

A privileged publication or broadcast is one made in any judicial proceeding. (Civ. Code, § 47, subd. (b)(2).) The litigation privilege applies to any communication "(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Silberg, supra,* 50 Cal.3d at p. 212.) "'[W]here the facts and circumstances under which a defamatory publication was made are undisputed, the question of privilege is a matter of law.'" (*Nguyen v. Proton Technology Corp.* (1999) 69 Cal.App.4th 140, 147 (*Nguyen*).)

We find *Pettitt v. Levy* (1972) 28 Cal.App.3d 484 (*Pettitt)* to be instructive. There, the plaintiffs obtained a building permit from the City of Fresno to alter premises for use as a beauty salon. According to the allegations of the complaint, the defendants submitted a false building permit to the city which omitted the street address of the business premises, resulting in the denial of the use of the premises as part of the plaintiffs' beauty salon. The court held that a publication made in a city planning commission or city council proceeding falls within the litigation privilege. (*Id.* at p. 488.) The court rejected the argument by the plaintiffs that the privilege did not apply to the criminal act of forging the permit, pointing to precedents holding that a perjured statement in a complaint does not destroy the privilege, the remedy being a criminal action for perjury. Nor was the court persuaded by the argument that the actual forgery took place prior to the meeting of the city planning commission. Rather, the court found the privilege applies even if the publication is made outside the courtroom, as long as it is made in the course of a judicial proceeding to achieve the objects of the litigation. (*Id.* at p. 490; see also *Cayley v. Nunn* (1987) 190 Cal.App.3d 300, 303 (*Cayley*) [allegedly slanderous remarks made in city council proceedings are within the ambit of the litigation privilege]; *Scott v. McDonnell Douglas Corp.* (1974) 37 Cal.App.3d 277 (*Scott*) [allegedly defamatory letters written by city councilmen to city manager and read at city council meeting were protected by the privilege].)

Here, the SAC alleged that respondents misrepresented to the City the costs of disposal and related services in order to justify the rate increases. According to the

second amended agreement, respondents had the burden of proving increases in rates. The city administrator was then required to study the request and make a report to the city council. After consideration of the report, and an opportunity for the respondents to be heard, the City would take action. We conclude that the publication to the city council of the reasons for the rate increases falls squarely within city council activity, and the trial court did not err in sustaining the demurrer based on the litigation privilege.

We are not persuaded otherwise by appellants' citation to *Nguyen, supra,* 69 Cal.App.4th at page 149 for the proposition that *Cayley, Pettitt,* and *Scott* predate *Silberg* and are of questionable authority. Because *Silberg* required that the communication be connected with the action, and have reasonable relevancy to the subject matter (*Silberg, supra,* 50 Cal.3d at p. 220), *Nguyen* criticized *Cayley* and *Pettitt's* more relaxed requirement of "a very loose and general relationship between the statement and the putative litigation." (*Nguyen, supra,* at p. 148.) In *Nguyen,* the court did not extend the litigation privilege to protect a former employer from a defamation action when he incorrectly alleged that a former employee was imprisoned for repeatedly and violently assaulting his wife. In that case, the letter had no relevance to the unfair competition action contemplated between the former employer and the former employee's new employer. Here, under the standards of *Silberg*, there is no doubt that the request for the rate increases are connected with city council activity.

B. Whether the litigation privilege applies to conduct

Appellants attempt to construct an exception to the litigation privilege by broadly asserting that communicative acts are protected while noncommunicative conduct is not. Appellants claim that the damages sought here are not for the publication of the rate adjustment requests, but for respondents' act of overcharging appellants for the refuse collection, citing *Kimmel v. Goland* (1990) 51 Cal.3d 202, 205 (*Kimmel*).

In *Kimmel*, our Supreme Court held that the litigation privilege precludes recovery for tortiously inflicted injury resulting from publications made during the course of judicial proceedings, but does not bar recovery for injuries from tortious conduct

regardless of the purpose for which such conduct is undertaken. (*Kimmel, supra,* 51 Cal.3d at p. 205.) The court specifically limited the holding to the "narrow facts before [it] involving noncommunicative acts -- the illegal recording of confidential telephone conversations -- for the purpose of gathering evidence to be used in future litigation." (*Ibid.*) In that case, the plaintiffs taped confidential telephone conversations with park management prior to bringing a lawsuit against it. The taped conversations occurred prior to the commencement of any actual judicial proceeding, and the park management sought damages under Penal Code section 632, which punishes by fine or imprisonment, persons who record confidential communications without consent. The court held that the litigation privilege did not apply to bar the park management's cross-complaint for damages for violation of Penal Code section 632 since it was based on the recording rather than the broadcast and publication of the conversations. That is, the privilege attaches to statements made in connection with a proceeding.

Here, on the other hand, the false statements were made for no other reason than to obtain rate increases, and we are not convinced otherwise by appellants' attempt to characterize the action as one arising out of the act of overcharging for refuse collection.

C. Whether the litigation privilege applies to fraudulent conduct

Citing *Stacy & Witbeck, Inc. v. City and County of San Francisco* (1996) 47 Cal.App.4th 1 (*Stacy*), appellants claim that the litigation privilege does not protect fraudulent conduct in the performance of a public works contract.

In that case, the First District held that a municipality can prosecute a judicial action under the False Claims Act under Government Code section 12650 (the FCA), based on a contract claim for overages incurred on a public works project. There, the plaintiffs entered into a contract with the City of San Francisco (S.F.) to construct a metro rail system. The contract required the plaintiffs to give written notice of any potential claim to the city engineer. The plaintiffs served S.F. with a Government Code claim asking for damages for breach of contract and subsequently submitted a preliminary construction contract claim and request for adjustment, as advised by the city engineer.

Subsequently, the plaintiffs sued S.F. and S.F. cross-complained, alleging a cause of action under the FCA on the basis that the plaintiffs presented a false claim for payment.

The court held that the FCA cause of action was not barred by the litigation privilege because the filing of the contract claim fulfilled two independent functions and served dual purposes. (*Stacy, supra,* 47 Cal.App.4th at p. 6.) That is, the plaintiffs were required to submit a change order under the terms of the contract, separate from any judicial action. Later, plaintiffs filed a contract claim, which served the litigation purpose. Moreover, the court noted that under the FCA, S.F. was obligated to investigate the presentation of false claims, and could thereafter bring a civil action. Accordingly, the court concluded that if the same conduct amounted to wrongful performance under the contract, it escaped the litigation privilege.

We conclude that appellants' citation to *Stacy* does not advance their cause. First, the narrow holding of *Stacy* was limited to the question of whether the litigation privilege precluded S.F.'s FCA cause of action. Indeed, Government Code section 12654, subdivision (e) states that section 47 of the Civil Code does not apply to claims under the FCA. Here, appellants are not municipalities bringing claims under the FCA, and we reject appellants' attempt to broaden the holding of *Stacy*, which would undermine the logical relationship requirement set forth by our Supreme Court in *Silberg*.

III. Whether the trial court erred in sustaining the demurrer to the SAC based on the collateral attack rule

Appellants urge that the trial court erred in sustaining the demurrer to the SAC based on the collateral attack rule, because the gravamen of the action is the respondents' fraud rather than the city council's action. We conclude otherwise.

In *Citizens for Responsible Development v. City of West Hollywood* (1995) 39 Cal.App.4th 490, 505 (*Citizens*), a citizens group challenged the decision of the planning commission of the City of West Hollywood to approve a 40-unit low income housing project for persons with AIDS in their neighborhood. Division Seven of this district held that the citizens group could not collaterally attack a previous administrative decision

designating certain properties as historic and excluding other properties because that decision had never been challenged or overturned through administrative mandamus.

Here, rate adjustments under the lease hauling contracts were set by the city council based on applications filed by Western Waste or the City. Any rate adjustment requests were to be studied by the city administrator, who was required to submit a report to the city council for review. After consideration of the report and opportunity for the contractor to be heard, the city council could then take action on the request. Under *Citizens*, appellants should have challenged the decision through administrative mandamus.

We conclude that the trial court did not err in sustaining the demurrer to the SAC based on the collateral attack rule.

IV. Whether the trial court erred in sustaining the demurrer to the fraud causes of action

Although we have concluded that the trial court did not err in sustaining the demurrer to the SAC based on the litigation privilege, the collateral attack rule, and the third-party beneficiary limitation, we shall briefly address appellants' further contentions that the trial court erred in sustaining the demurrer to the individual causes of action.

In order to state a cause of action for fraud, the plaintiff must allege: (1) a false representation; (2) made with knowledge of its falsity; and (3) with an intent to deceive; coupled with (4) actual detrimental reliance; and (5) resulting damage. (*Lim v. The TV Corp. Internat.* (2002) 99 Cal.App.4th 684, 694.)

We find that the allegations set forth in the SAC are insufficient to allege a cause of action for fraud. Specifically, while appellants allege that respondents made misrepresentations in order to justify rate increases, they have not alleged actual detrimental reliance on the part of appellants. Indeed, the SAC alleged that appellants did not discover the false nature of the representations until within three years of the filing of the SAC.

We are not convinced by appellants' argument that they adequately pled "indirect communications" as a basis for their fraud claims, citing *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1095 (*Mirkin*). The indirect communication principle is stated as: the maker of a fraudulent misrepresentation is liable to one who acts in justifiable reliance, if the misrepresentation is made to a third person and the maker intends that it will be repeated to the other, and that it will influence his conduct in the transaction involved. (*Ibid*.) In that case, our Supreme Court held that plaintiffs had not stated a cause of action for fraud because they were unable to allege that the misrepresentations made by Maxicare Health Plans, Inc., regarding its financial status, ever came to their attention.

Similarly, here, appellants have not alleged that they actually read or heard the justifications for the rate increases, and therefore cannot state a claim for fraud. Nor are we persuaded by appellants' argument that the misrepresentations need not actually have been communicated to appellants because the City acted as appellants' agent. Some cases, as noted in *Mirkin, supra,* 5 Cal.4th at pages 1097-1098, have held that plaintiff patients and property owners could sue for breach of express warranty and fraud where their physicians and agents relied on misrepresentations made by pharmaceutical companies and lenders. Here, on the other hand, appellants have not alleged that the City acted as their agent but merely alleged that the City was their fiduciary.

The trial court did not err in sustaining the demurrer to the causes of action for fraud.

V. Whether the SAC stated a cause of action for deceptive practices under Civil Code section 1750

Next, appellants argue that the trial court erred in sustaining the demurrer to their cause of action for deceptive practices under Civil Code section 1750. We disagree. As previously discussed, we find that the trial court properly relied on the bar of the litigation privilege and collateral attack, and we additionally conclude that appellants failed to adequately plead a cause of action.

Under Civil Code section 1750 et seq., the Consumer Legal Remedies Act, consumers injured by unfair and deceptive business practices prohibited by Civil Code section 1770 may bring an action against a person to recover damages. Appellants urge that the SAC sufficiently alleged that Western Waste violated Civil Code section 1770, subdivision (a)(5), which prohibits the representation of services that have sponsorship, approval, characteristics, benefits or qualities which they do not have.

Our review of the SAC convinces us that appellants failed to allege that Western Waste misrepresented the nature of the services they were providing. In the SAC, appellants complain only of the misrepresentation regarding the justification for the rate increases. Moreover, we also conclude that the SAC did not allege a violation of Civil Code section 1770, subdivision (a)(14), which prohibits a representation that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law. Nowhere in the SAC are such allegations made.

We conclude that the trial court did not err in sustaining the demurrer to the cause of action for deceptive practices.

VI. Whether the trial court erred in sustaining the demurrer to the cause of action for unfair competition

Although the litigation privilege and the improper collateral attack doctrines preclude appellants from their cause of action for unfair competition, appellants next contend that the trial court erred in sustaining the demurrer to the unfair competition cause of action, arguing that the trial court's ruling that "plaintiffs as third party beneficiaries are not entitled to greater rights under the contract than the promisor (the City, here)" is contrary to law. Appellants do not support their argument other than by stating that California unfair competition law allows persons to bring an action against persons engaging in unfair competition. On that basis alone, we could find that appellants abandoned their argument. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [point deemed waived where brief cited only general legal principles without relating them to specific facts or admissible evidence].)

In any event, the trial court relied on *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122 (*Marina*) for the proposition that a third party beneficiary cannot assert greater rights than those of the promisee[5] under the contract. In *Marina*, the court held that a third party could not seek a redetermination of a building lease between the County of Los Angeles and the lessees because once the County determined the rates were fair and reasonable, it was bound by those rents and could not seek a retroactive modification. As third parties, the tenants could not seek a redetermination of the rents, which would give them a right not existing under the lease. Similarly, here, once the City settled with respondents it could not then bring an unfair competition action against them.

Appellants further urge that they have sufficiently pled a cause of action for unfair competition under Business and Professions Code section 17200, citing *State Comp. Ins. Fund v. Superior Court* (2001) 24 Cal.4th 930. In addition to the above-cited grounds, appellants' argument does not avail them because the *State Comp. Ins. Fund* court addressed the issue, not pertinent here, of whether or not the plaintiff's action was precluded by Insurance Code section 11758 immunity.

VII. Whether the trial court erred in sustaining the demurrer to the cause of action for conversion

Appellants finally urge that the trial court erred in sustaining the demurrer to their cause of action for conversion. We disagree. As we have previously noted, we find that the trial court properly relied on the bar of the litigation privilege and collateral attack, and conclude that appellants failed to adequately plead a cause of action for conversion.

The elements of conversion are: (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by wrongful act or

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5 We note that the trial court may have made a clerical error when it stated that a third party beneficiary cannot assert greater rights than those of the "promisor" under the contract.

disposition of plaintiff's property rights; and (3) damages. (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598.) However, a generalized claim for money is not the proper subject of an action for conversion. (*Vu v. California Commerce Club, Inc. Insurance* (1997) 58 Cal.App.4th 229, 235.) Appellants here have only estimated the amount they believed they have been overcharged.

We conclude the trial court did not err in sustaining the demurrer to the cause of action for conversion.

DISPOSITION

The judgment is affirmed. Respondents shall receive costs of appeal.

NOT FOR PUBLICATION.

_____, J.
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We concur:

_____, P. J.
BOREN

_____, J.
ASHMANN-GERST